

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA)
)
 v.) Case No. 2:17-cr-74
)
SHAUN KASTNER)

OPINION AND ORDER

Defendant Shaun Kastner has moved to suppress statements obtained by law enforcement officers following his arrest. Kastner claims that prior to being read his *Miranda* rights, he was questioned briefly by law enforcement. After he was read his rights, he provided a lengthy statements about his involvement in criminal activities. Kastner now argues that the *Miranda* warning was ineffective because it was part of a deliberate, two-step strategy to elicit information in violation of his Fifth Amendment rights.

The Court held a testimonial hearing on Kastner's motion on November 26, 2018. Government witnesses denied any pre-*Miranda* questioning. The Court finds the government witnesses credible, and further finds that even assuming pre-warning questioning, the government has carried its burden of disproving Kastner's claim of a two-step strategy. The motion to suppress is therefore **denied**.

Factual Background

On June 27, 2017, at approximately 10:30 p.m., Vermont State Police ("VSP") stopped Kastner's vehicle on Interstate 89 in

Sharon, Vermont. Law enforcement had been investigating Kastner's drug-related activities for several months, and had been monitoring his movements by tracking his cell phone. That night, law enforcement believed that Kastner was returning to Vermont from Massachusetts with a supply of drugs.

During the vehicle stop, Kastner was arrested for prior heroin distribution. A search of his vehicle did not reveal contraband, but a pat-down of his body indicated the presence of a hard object around the area of his buttocks. Kastner was subsequently transported to the VSP barracks in Royalton, Vermont, where he was placed in a holding cell.

Shortly after Kastner's arrival at the Royalton barracks, three officers entered his cell. The first to enter were FBI Special Agent Colin Simon and Vermont Drug Task Force Detective Matthew Plunkett. They were soon followed by Detective Sergeant Karl Gardner of the Vermont Drug Task Force. Gardner informed Kastner that he was the subject of an ongoing investigation, and that police had identified an object on his person that they did not believe to be a weapon. Gardner asked Kastner to give him the object, and according to the testimony of Special Agent Simon, Kastner initially refused. Gardner then explained the strength of the government's case against Kastner, which included a series of controlled drug purchases. The officers did not ask Kastner any questions at that time.

Kastner ultimately reached into his pants and handed over a bag. The officers asked about the contents of the bag to determine whether they needed to use any special handling procedures. Kastner does not object to that questioning.

Detective Sergeant Gardner then left the holding cell to process the contents of the bag. There is a factual dispute about what was said after Gardner's departure. According to Kastner's testimony, Special Agent Simon asked him what he had been doing at a certain address in Pittsfield, Massachusetts. Kastner reportedly responded that he was visiting a friend. Special Agent Simon allegedly asked the name of the friend, which Kastner provided. Kastner testified that officers then escorted him to another room, whereupon they read him his *Miranda* rights and proceeded to question him in detail.

Special Agent Simon testified that none of the officers present in the holding cell asked any questions about Kastner's activities prior to reading him his *Miranda* rights. Simon also noted that he would have been unlikely to question Kastner, since Detective Plunkett was the assigned case agent and thus had superior knowledge about the facts of the case. Indeed, Detective Plunkett asked most of the questions during Kastner's post-*Miranda* session. That session lasted approximately 90 minutes, during which Kastner provided law enforcement with significant information about his criminal conduct.

Detective Sergeant Gardner confirmed that prior to his departure from the holding cell, no questions were asked. Gardner also noted that all conversations in the holding cell are recorded, though the recording in this case no longer exists because it was never requested by the case agent. The government admitted into evidence the *Miranda* form completed by law enforcement and signed by Kastner on the night of his arrest, as well as the recording of the post-*Miranda* questioning. The Court has reviewed that evidence.

Discussion

The initial factual issue in this case is whether law enforcement officers asked Kastner any questions prior to reading him his *Miranda* rights. If they did not, there can be no claim of a two-step strategy. Kastner contends that Special Agent Simon asked him questions about his conduct at a specific address in Massachusetts. Special Agent Simon, after hearing Kastner's testimony, testified unequivocally that he never asked any such questions. Simon further explained that he was unlikely to have asked those sorts of questions since he was not the case agent. As an experienced law enforcement agent, Simon may also have known that his communications with Kastner were being recorded. The Court finds Simon's account credible.

Even assuming, however, that questions were asked in the holding cell as alleged, the facts do not demonstrate a

deliberate two-step strategy. When a suspect is interrogated twice, once before being given a *Miranda* warning and once after, courts "must address whether the officers employed a 'deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview,' and if so, whether 'specific, curative steps' were taken to obviate the violation that occurred." *United States v. Capers*, 627 F.3d 470, 477 (2d Cir. 2010) (quoting *Missouri v. Seibert*, 542 U.S. 600, 621 (2004) (Kennedy, J., concurring)). In determining whether the "officers' actions are sufficiently indicative of a deliberate circumvention of *Miranda* to require that a defendant's statements must be suppressed," courts must "review the totality of the objective and subjective evidence surrounding the interrogations in order to determine deliberateness, with a recognition that in most instances the inquiry will rely heavily, if not entirely, upon objective evidence." *Id.* at 478-79. "[T]he burden rests on the prosecution to disprove deliberateness," and "the government must meet its burden of disproving the deliberate use of a two-step interrogation technique by a preponderance of the evidence." *Id.* at 479, 480.

The Second Circuit has held that five factors identified in the *Seibert* plurality serve as "helpful indicia for whether an alleged two-step interrogation was intended to circumvent *Miranda*." *United States v. Moore*, 670 F.3d 222, 230 (2d Cir.

2012). Those five factors, focusing on objective indicia, are "(1) the completeness and detail of the questions and answers in the first round of interrogation, (2) the overlapping content of the two statements, (3) the timing and setting of the first and the second, (4) the continuity of police personnel, and (5) the degree to which the interrogator's questions treated the second round as continuous with the first." *Seibert*, 542 U.S. at 615.

Here, there is no subjective evidence of intent. As to the first of the objective *Seibert* factors, there is a significant difference in the length and breadth of the two sets of questioning. The initial conversation in the holding cell reportedly consisted of two questions. The post-*Miranda* session covered far more detail and lasted approximately an hour and a half. The second *Seibert* factor, regarding overlapping content, reflects this same imbalance, as the post-*Miranda* questioning was far more thorough and probing than the questions Kastner was allegedly asked prior to being read his rights.

The timing of the two sets of questioning, with one immediately following the other, as well as the personnel involved, might provide support for Kastner's position. However, those factors carry less weight when viewed in the context of the *Seibert* ruling. *Seibert* bars law enforcement from intentionally "withholding *Miranda* warnings until after interrogating and drawing out a confession" so that the defendant can repeat the

confession once *Miranda* warnings are given. 542 U.S. at 609; see also *id.* at 616 (noting that the unwarned interrogation was “systematic, exhaustive, and managed with psychological skill”). Here, there was no initial confession. Prior to being read his rights, Kastner allegedly told law enforcement the name of a friend he had been visiting. Although law enforcement undoubtedly believed that person to be a source of drugs, Kastner’s statements were quite limited, and did not provide the sort of information that would suggest imminent and full cooperation. Consequently, the timing of the post-*Miranda* questioning does not compel the conclusion that the officers were engaging in a deliberate, two-step strategy.

With regard to the fifth *Seibert* factor, there is no indication that law enforcement treated the post-*Miranda* session as a continuation of any prior questioning. There is no reference in the recorded interrogation to the prior conversation, and no suggestion that Kastner had previously provided information about his activities at the Pittsfield address. The Court therefore finds that, given the totality of objective and subjective evidence, the government has carried its burden of disproving a two-step strategy.

Conclusion

For the reasons set forth above, Kastner’s motion to suppress is **denied**.

DATED at Burlington, in the District of Vermont, this 28th
day of November, 2018.

/s/ William K. Sessions III
William K. Sessions III
District Court Judge